SUPREME COURT, U. S.
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Nos. 666, 916 and 924

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

AMERICAN TRUCKING ASSOCIATION, INC., ET AL.,
Appellants
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

On Appeal From The United States District Court For The Northern District of Illinois, Eastern Division

MOTION OF FREIGHT FORWARDER APPELLEES TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 908

AMERICAN TRUCKING ASSOCIATION, INC., ET AL., *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 916

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 924

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

On Appeal From The United States District Court For The Northern District of Illinois, Eastern Division

MOTION OF FREIGHT FORWARDER APPELLEES TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, the freight forwarder appellees, listed in the Appendix hereto, move that the final decree and judgment of the District Court herein be affirmed.

The numerous freight forwarder appellees were parties in the Interstate Commerce Commission proceeding and were intervening plaintiffs in the District Court. In this motion we shall refer primarily to the freight forwarding aspect of the case; the railroad appellees will discuss the other aspects in their motion to affirm.

The freight forwarding aspect of the case was explicitly an independent ground stated for the unanimous decision of the three-judge District Court (244 F. Supp. 955, 967-8) and, accordingly, is an independent ground for affirmance. We respectfully submit that the carefully reasoned opinion of the court below is clearly correct and that plenary consideration is not warranted.

The opinion of the District Court (244 F. Supp. 955) is reproduced in Appendix A to the jurisdictional statement of American Trucking Association, Inc. (No. 908). The report of the Commission, including the dissenting and concurring opinions, is also attached to that jurisdictional statement and is printed at 322 I.C.C. 301.

STATEMENT

The Interstate Commerce Commission's revolutionary new Rules 2 and 3, which the court below found were contrary to the policy and terms of the Interstate Commerce Act, are of vital concern to the nation's freight forwarders. As the Vice Chairman of the Commission stated in his dissenting opinion, the rules "may very well destroy the freight forwarding industry" (322 I.C.C. at 394). The statutory provisions that would be violated by the rules reflect a deliberate Congressional purpose to preserve the freight forwarding industry by protecting it against the invasion from other carriers which the proposed rules would permit. That policy and the pertinent statutory provisions are ignored or inadequately described in the jurisdictional statements.

Freight forwarders are quite small as compared to motor carriers, but the forwarders nevertheless have offered constant competition to the motor carriers in serving the shipping public. The total gross intercity freight revenues of Class I motor carriers alone totalled more than six billion

dollars in 1964 while the total gross revenues of freight forwarders were less than one-twelfth of that amount (79th Annual Report of the Interstate Commerce Commission, pp. 162, 170).

Heretofore, throughout the more than twenty-year history of federal regulation of freight forwarding, the Commission has recognized and held that the Interstate Commerce Act prohibits the motor carriers from engaging in the forwarders' authorized practice of shipping the customers' goods by rail. The proposed new rules, however, would permit the motor carriers to initiate a direct invasion of the freight forwarding business, shipping their freight by rail under the rail tariffs for the transportation of trailers on flatcars. If such permission were to go into effect, the prospects for continuation of the vigorous competition which the forwarders now offer to the giant motor carrier industry would be bleak. Congress, however, has expressly directed the Commission *not* to grant freight forwarding permission to any common carrier by motor vehicle and the District Court accordingly has found the proposed permission to be invalid. The jurisdictional statements show no grounds for reversal of that conclusion. Indeed, the jurisdictional statements of the Government and of the American Trucking Association, Inc. fail even to mention that statutory prohibition.

Freight forwarders are common carriers, authorized and regulated in Part IV of the Interstate Commerce Act (49 U.S.C. 1001 *et seq.*). A freight forwarder collects and consolidates relatively small individual shipments and then ships the consolidated load by a physical or line-haul carrier (usually a railroad) to a destination point. The freight forwarder then separates the individual shipments and distributes them to the consignees. Some forwarder shipments by rail are made by trailers-on-flatcars (TOFC) and

some by boxcar. As a shipper by rail the freight forwarder pays the railroad tariff rates.

The distinctive feature of the freight forwarding business is that a forwarder ships assembled goods between the origin and destination terminals rather than itself performing the line-haul transportation service. This distinctive feature is based on the statutory provision in Part IV of the Act defining a freight forwarder as a carrier which, among other things, "utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act." (Sec. 402(a)(5); 49 U.S.C. 1002(a)(5)). There is no parallel provision permitting carriers by motor vehicle, rail or water to ship between terminals by other carriers, *i.e.*, over each other. The freight forwarder, however, while granted the distinctive right to ship over other carriers, is limited in its authorized activities. The forwarder is not authorized "to conduct any direct railroad, water or motor-carrier operations" except within the respective terminal areas (Sec. 410(h); 49 U.S.C. 1010(h)). The forwarder also has not been empowered as are motor carriers (Sec. 216(c); 49 U.S.C. 316(c)) to make through routes or joint rates with other common carriers.

In 1942 when Congress enacted Part IV of the Act, it included an express provision to remove the possibility that motor carriers might enter the business of freight forwarding:

> "No such permit [for freight forwarding] shall be issued to any common carrier subject to part I, II, or III of this Act . . ." (Sec. 410(c); 49 U.S.C. 1010(c)).

The declared policy of Congress regarding motor carriers, water carriers and railroads, in relation to freight forwarding, was "the policy" of permitting them to control

freight forwarder subsidiaries but "of not permitting them to engage directly in the freight-forwarding business" (H.R. Rep. No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 15). In accordance with that policy and with the terms of the Act, the Commission (until its action in this case) had uniformly held that it is unlawful for a motor carrier to ship its customers' goods by rail, either by making TOFC shipments or by making boxcar shipments. Those Commission decisions are referred to by the District Court (244 F. Supp. at 968-9).

The core of the Commission's new rules is contained in Rule 3(a). This rule would permit motor carriers and water carriers as well as freight forwarders to "utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier" (322 I.C.C. at 337). No one questions that under this rule motor carriers would be allowed to engage directly in the business of freight forwarding.* After having assembled and consolidated their shipments, motor carriers would be allowed to ship them by rail to themselves at a destination area, there breaking down the consolidated shipments into the individual shipments and distributing them to the consignees.

The District Court held that the proposed rules would be counter to the provisions of Part IV of the Act and to the policy of Congress referred to above (244 F. Supp. at 967-8). The Court found no merit in an argument that a phrase in the statutory definition of a freight forwarder

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* For convenience, we refer herein principally to motor carriers although the rules would also permit water carriers to act as forwarders by rail instead of performing their authorized water transportation. The water carrier would not need to go even near the water.

should be construed as meaning that Congress, in 1942, had granted blanket permission to motor carriers to engage in freight forwarding operations. Such a construction would have been at odds with the Congressional action in prohibiting the granting of freight forwarding permits to such carriers. The District Court stated:

> "To keep faith with Congress, to give reasonable effect to its commands, we are obliged to eschew word-play and to read the statutes in the light and spirit of their purpose." (244 F. Supp. at 967).

The Commission's order proposing to put the new rules into effect was therefore set aside.

ARGUMENT

1. Part IV of the Interstate Commerce Act, regulating freight forwarding, was enacted in 1942. Three years prior to that date, the Commission had made it clear that a motor carrier could not lawfully act "as a forwarder or shipper" by rail of the freight it was handling for its customers. *Substituted Freight Service,* 232 I.C.C. 683, 690 (1939). As the District Court in the present case stated, the Commission in 1939 "plainly held that a motor carrier could not lawfully substitute rail service for its authorized highway service for a part of the line haul. . . . This interpretation of the Act was followed and affirmed in an unbroken line of decisions of the Commission in the intervening years. . . . For twenty-five years, until the decision here under review, the Commission had adhered to this interpretation of the act directly in conflict with its newly announced views" (244 F. Supp. at 968).

When Congress enacted Part IV it considered whether motor carriers, water carriers and railroads should be permitted to engage in freight forwarding. Consistent with the Commission's decision of 1939, Congress expressly

concluded that such carriers should *not* be permitted to engage in freight forwarding. The House of Representatives Committee Report regarding the bill to regulate freight forwarding stated:

> "The provisions of this subsection [Sec. 411(g)], as well as those of section 410(c), are intended to carry out *the policy* of permitting such carriers to engage in freight forwarding indirectly, through control of subsidiary corporations, but *of not permitting them to engage directly in the freight-forwarding business.* It is believed that this policy will result in more satisfactory administration of the provisions of the act as a whole than would be the case if direct freight-forwarding operations by common carriers subject to part I, II, or III were permitted." (H.R. Rep. No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 15).*

To be absolutely sure that the Congressional policy against freight forwarding operations by motor carriers and other physical common carriers must be followed by the Commission in its administration of the Act, Congress included in Part IV the specific prohibition ordering the Commission not to grant any freight forwarding permit to any of the common carriers that are subject to Parts I, II, or III of the Act (Sec. 410(c); 49 U.S.C. 1010(c), quoted at page 4 above). Those common carriers, of course, include motor carriers. And Congress also included in Part IV the provision that "No person shall engage in service subject to this part unless such person holds a permit, issued by the Commission, authorizing such service. . . ." (Sec. 410(a); 49 U.S.C. 1010(a)). This is the permit that Congress told the Commission not to give to motor carriers and other common carriers.

In the present case, the District Court described the bills that were introduced in Congress in 1962 and again

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* Italics herein are ours.

in 1963 to achieve precisely the result of the Commission's rules here in issue (244 F. Supp. at 969-70). Under those bills, motor carriers would have been allowed to make rail shipments of trailers-on-flatcars. Congress, however, was not persuaded by the proponents; the bills were not enacted.

One of the witnesses who appeared at the hearings on those recent bills was a representative of the freight forwarders. He pointed out the drastic shift in Congressional policy that was being proposed, stating in part: "And every motor carrier in the United States would be given a wide-open invitation to enter the freight forwarding business without a permit" (Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 4700 and H.R. 4701, 88th Cong., 1st Sess., May 9, 1963, p. 519). Congress declined to extend that invitation or permission to the motor carriers. When the Commission then undertook to grant that permission by adopting Rule 3(a), to allow motor carriers to operate as forwarders rather than as transporters, the Commission's action was directly opposed to the policy of Congress and to the terms of the Act.

2. The appellants offer no arguments worthy of plenary consideration to support the proposal to permit motor carriers and water carriers to engage in freight forwarding by making rail TOFC shipments.

The jurisdictional statements of the Government and of American Trucking Association, Inc. completely omit any mention of the statutory prohibition in Section 410(c) against granting permission to motor carriers, water carriers and railroads to engage in freight forwarding. They also fail to mention the Congressional "policy . . . of not permitting them to engage directly in the freight-forwarding business." The prohibition against freight for-

warding by motor carriers was an express and independent ground for the decision of the District Court (244 F. Supp. at 967-8), and the failure of the Government and of ATA to refer to the prohibition reflects the lack of merit in the appeals.

ATA, in its one-paragraph discussion of freight forwarding, asserts that trailer-on-flatcar service is not "rail service" (ATA J.S. p. 21). ATA evidently overlooks the fact that the Commission itself admitted otherwise in its report in this case. The Commission stated:

> "In the *New Haven* case, *supra* [293 I.C.C. 93], it was found, properly we think, that *'trailer-on-flatcar transportation is in fact transportation by railroad,'* and that 'this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers.'" (322 I.C.C. at 343)

When a railroad holds itself out by tariff publication to carry goods from origin to destination, the service under that rail tariff plainly is rail service regardless of whether the goods consist of boxes or articles to be carried in a boxcar or whether they consist of loaded or empty trailers to be carried on a flatcar.

ATA mentions, as if in rebuttal, that a motor carrier is authorized to assemble shipments at the origin point and to distribute them at the destination (ATA J.S. p. 21). Such authority is unquestioned when that service is being provided as a part of the motor carrier's authorized motor vehicle service, but it is irrelevant here. The motor carrier is *not* authorized to act as a forwarder, tendering a shipment to a railroad for rail transportation, rather than either transporting the shipment itself or entering into a voluntary joint rate under Section 216(c). If the motor carrier, after having assembled the shipments, merely forwards the shipments by shipping them by rail like an ordi-

nary rail shipper, the motor carrier would be engaging directly in the freight forwarding business, in violation of the statute and of the policy of Congress. As the District Court stated:

> "No reason is suggested why we should suppose that Congress meant to allow a motor carrier to perform only the services of a freight forwarder, not as an incident to furnishing transportation, merely because the carrier holds a bare unexercised authority to furnish transportation, while at the same time Congress prohibited the licensing of motor carriers as freight forwarders." (244 F. Supp. at 967)

For any shipments that would be assembled and consolidated at the origin terminal and then shipped by rail to the destination terminal, the motor carrier would be conducting a freight forwarding operation pure and simple, with a "bare unexercised authority to furnish transportation" by motor vehicles over public highways. The fact that a motor carrier is authorized to assemble and to distribute shipments as an incident to its authorized highway service, or the fact that the motor carrier might be properly exercising its authority by performing the actual transportation service for *other* shipments, would not justify it in engaging in the direct freight forwarding operation that would be permitted under the proposed new rules.

The Government argues that the Act should be interpreted as meaning that motor carriers can engage in freight forwarding between any and all of the points which they are authorized to serve by motor vehicles over public highways (Gov't. J.S. p. 18). Such an interpretation, however, would be in direct conflict with the declared Congressional policy and with the statutory prohibition against permitting motor carriers to engage in freight forwarding. Both the policy and the prohibition are comprehensive; neither of

them could reasonably be read to have an implied exception that would allow motor carriers to engage in freight forwarding between the points specified in their motor carrier certificates.

Moreover, since motor carriers are clearly authorized to form voluntary through routes and publish joint rates for motor vehicle service, the Government's theory and the proposed rules would permit the motor carriers (by forming through routes with each other) to engage in freight forwarding between any points in the country where piggyback rail service is offered in the rail tariffs.

The Government's reference to the statutory definition of "freight forwarder" in this connection affords no support for its contentions. That definition (Sec. 402(a)(5); 49 U.S.C. 1002(a)(5)) reads as follows:

> "The term 'freight forwarder' means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act."

The pertinent phrase in the parenthetical provision is the phrase "as a carrier." When a motor carrier interchanges trailers or other freight with a railroad under

an arrangement for a through route, pursuant to the authority in the motor carrier part of the Act (Sec. 216(c)), the motor carrier is acting "as a carrier subject to part . . . II . . . of this Act." But if a motor carrier were to tender a shipment to a railroad for transportation under a published tariff such as the tariffs for TOFC service, it would be acting as a forwarder or shipper, and not in any capacity subject to or authorized by Part II of the Act. Just three years *before* this definition of freight forwarder was enacted, the Commission had held that a motor carrier which tendered its assembled and consolidated shipments for transportation by a railroad was acting "as a forwarder or shipper" and was therefore exceeding its authority under the Act. *Substituted Freight Service,* 232 I.C.C. 683, 690 (1939). And three years *after* the definition was enacted, the Commission held that it would be unlawful for a motor carrier to ship its loaded trailers by rail, since the motor carrier "would be a shipper in its relation to the railroad." *Ringsby Truck Lines, Inc.* v. *Atchison, T. & S. F. Ry. Co.,* 263 I.C.C. 139, 141 (1945). The exemption that applies for various activities when a motor carrier is acting "as a carrier" subject to Part II clearly does not provide a loophole to defeat the Congressional purpose and directive that motor carriers shall not be permitted to engage in freight forwarding. As the District Court emphasized, reasonable effect is to be given to the commands of Congress, and statutes must be read "in the light and spirit of their purpose" (244 F. Supp. at 967).

The contentions of National Automobile Transporters Association of Detroit, Michigan, with respect to freight forwarding, are similar to the contentions of the other appellants, discussed above (NATA J.S. p. 17).

CONCLUSION

The District Court held that the Commission's new rules violated the provisions and purposes of Part IV of the Act. That holding is clearly correct and, accordingly, the judgment should be affirmed without further argument.

Respectfully submitted,

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APPENDIX

List of Freight Forwarder Appellees on Whose Behalf this Motion to Affirm is Filed

Acme Fast Freight, Inc.
Century Carloading, Inc.
Clipper Carloading Company
International Forwarding Company
Lifschultz Fast Freight
Merchant Shippers Association
National Carloading Corporation
Ohio Fast Freight Corporation
Pacific & Atlantic Shippers
Sheldon Forwarding Company
Springmeier Shipping Co., Inc.
Western Carloading Company
Westland Forwarding Company

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